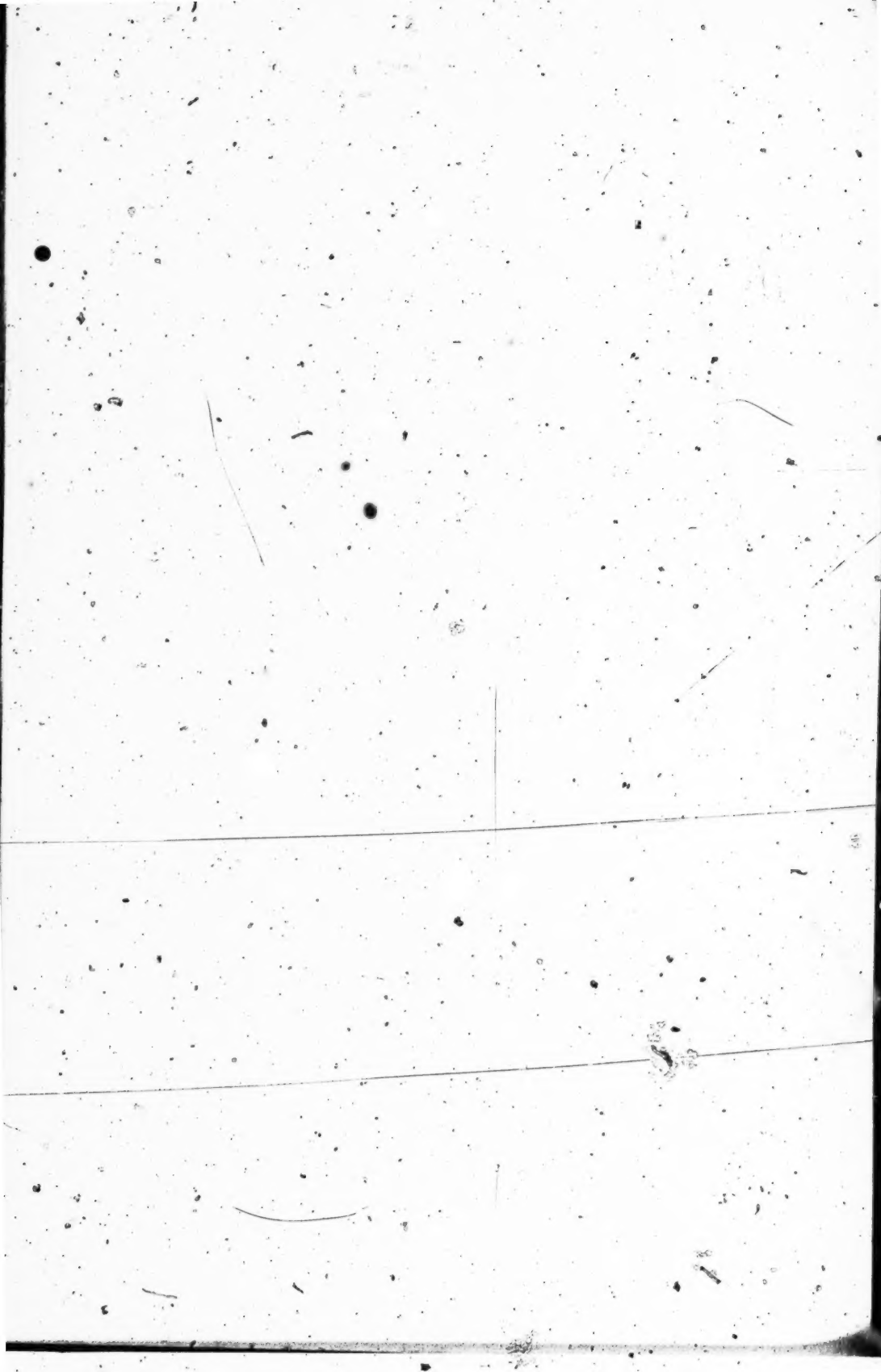

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CHARLES ELMO

IN THE

Supreme Court of the United States

October Term, 1933.

No. [redacted] 152

NEWTON W. LUMBRA,
Petitioner and Appellee below,

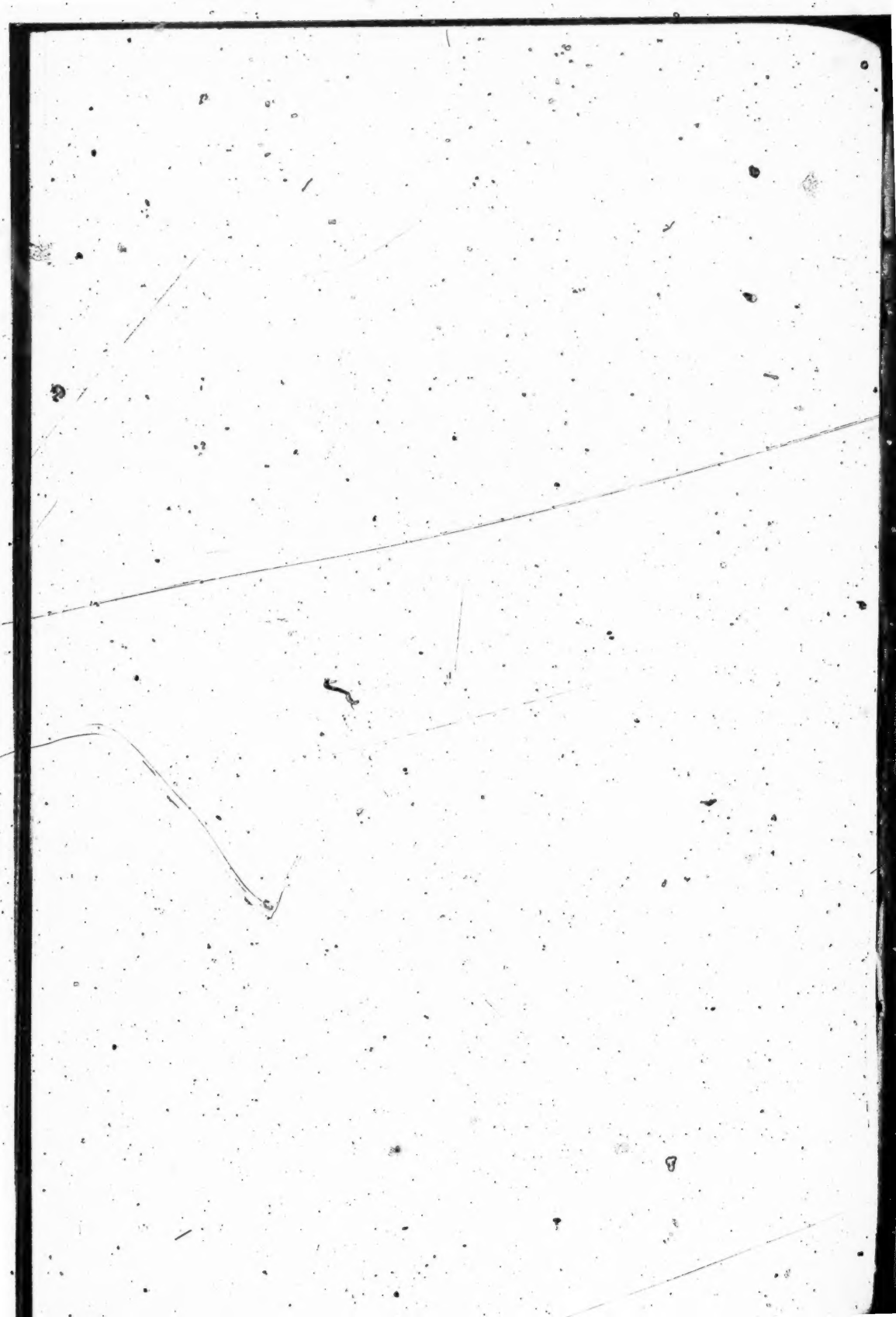
vs.

UNITED STATES OF AMERICA,
Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. A. McNAMARA,
HAROLD C. SYLVESTER,
CONSUELO B. NORTHROP,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.



INDEX.

	Page
Petition for Writ	1
Summary statement of matter involved	1
Reasons relied upon for the Allowance of Writ	3
Prayer for Writ	4
Brief in Support of petition for Writ of Certiorari	5
Opinion of Courts below	5
Jurisdiction	12
Statement of Case	13
Specification of Errors	13
Argument	14
Point I	14
Point II	18
Conclusion	19

AUTHORITIES CITED.

Cases.

Bartee vs. U. S. 60 Fed. (2) 247 C. C. A. 6	3, 19
Black vs. Travellers Ins. Co., 121 Fed. 732	19
Jenkins vs. Pacific M. L. Ins. Co., 131 Calif. 121, 63 Pac. 180	17
Knickerbocker Life Ins. Co. vs. Trefz, 104 U. S. 197, 26 L. Ed. 708	19
Layne Corp. vs. Western Well Works, 261 U. S. 387, 43 Sup. C. 422, 67 L. Ed. 712	13
Nat'l Accident Society vs. Rolstin, 101 Ill. Appeals 192	17
New Orleans, etc. vs. National Rice Mills Co., 234 U. S. 80, 39 Sup. C. 726, 58 L. Ed. 1223	17
N. Y. Life Insurance vs. Brown, 39 Fed. (2) 376, (C. C. A. 5)	17
Preferred Accident Insurance Co. vs. Barker, 93 Fed. 158, (C. C. A. 5)	17, 19
Rawlins vs. Business M. A. Association, 204 Mo. Appeal 679, 220 S. W. 1022	17
Reynold vs. Equitable Accident Co., 48 Hun. N. Y. 605, 1 N. Y. 738	17
Travellers Insurance Co. of Hartford, Conn. vs. Sadie P. McConkey, 127 U. S. 661, 8 Sup. C. 1360, 32 L. E. D. 308	13, 17
Travellers Insurance Co. vs. Shepard, 85 Ga. 751, 12 S. E. 18	17
Tyrakowski vs. U. S., 50 Fed. (2) 776, (C. C. A. 7)	3, 11, 12, 19
U. S. vs. Fitzpatrick, 60 Fed. (2) 562, (C. C. A. 10)	3, 19
U. S. Casualty Co. vs. Hanson, 20 Colo. A. 393, 79 Pac. 176	19
Utter vs. Travellers Insurance Co., 65 Mich. 545	17
Western Electric Company vs. Splitdorf Elec. Co., 264 U. S. 463, 44 Sup. C. 342, 68 L. Ed. 792	13

STATUTES.

	Page
Title 38 Sec. 445 U. S. C. A.	2
Title 28 Sec. 762—763—765 U. S. C. A.	2
40 Stat. 555	14
43 Stat. 609	15

TEXTS.

7 Couch on Insurance 5495	18, 19
2 Couch on Insurance 1512	18, 19
Jones Commentary on Evidence 1913 Vol. 2, Sec. 372	18
1 C. J. 511	19

IN THE

Supreme Court of the United States

October Term, 1933.

No. 183.

NEWTON W. LUMBRA,
Petitioner and Appellee below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellant below.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof.

To the Honorable, the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

This is an action at law brought in the United States District Court for the District of Vermont by Newton W. Lumbra, petitioner herein, against the United States of America, respondent herein, for the recovery of benefits upon a War Risk Insurance Policy.

Trial was by jury and a verdict and judgment was rendered in favor of Newton W. Lumbra against the United States of America for $8912.50. An appeal from said judgment was taken by the respondent to the Circuit Court of Appeals for the Second Circuit, which reversed the judgment of the District Court.

The petitioner was a soldier in the United States Army from 1917 to 1919 and carried a policy of War Risk Insurance, which lapsed for non-payment of premiums on May 1, 1919. During petitioner's war service and while the policy was in effect, petitioner was injured in France by the explosion of a high explosive shell which fell near him during a bombardment of the trenches where he was on duty. Petitioner was removed to the hospital and while in the hospital he had "faint, weak spells * * * * everything go black and the sweat stand out on me and I would have to sit down". He was returned to active duty but these spells continued and grew gradually worse. He was suffering from this condition when discharged and when the policy lapsed. This condition continued after discharged and until 1923 when epilepsy developed and he has since been subject to epileptic attacks at frequent intervals.

Action was brought by the petitioner under Title 38, Sec. 445 U. S. C. A. which authorizes suits against the United States on policies of War Risk Insurance under title 28, Sects. 762, 763 and 765 U. S. C. A. known as the Tucker Act.

The question involved was whether or not the petitioner had become permanently and totally disabled within the meaning of the War Risk Insurance Act at

the date the policy lapsed for non-payment of premiums. The case was submitted to the jury and a verdict was returned for the petitioner. Judgment was entered upon the verdict.

The case was appealed to the Circuit Court of Appeals for the Second Circuit by the respondent, the United States, and said Court reversed the judgment of the United States District Court for the District of Vermont in an opinion filed March 6, 1933. The main question involved in the Circuit Court of Appeals was whether or not there was sufficient evidence of petitioner's permanent and total disability at the time petitioner's policy lapsed for non-payment for the trial Court to submit the case to the jury, which question was decided by said Circuit Court of Appeals for the Second Circuit and materially affected the determination of said appeal.

II.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals as to the test of the permanency of the petitioner's total disability is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the same matter in the case of Tyrakowski vs. U. S. 50 Fed. (2) 766, (C. C. A. 7) and is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit on the same matter in the case of Bartee vs. U. S. 60 Fed. (2) 247, (C. C. A. 6) and with the case of U. S. vs. Fitzpatrick, 62 Fed. (2) 562, (C. C. A. 10).

2. The decision of the Circuit Court of Appeals of the Second Circuit as to the measure of proof re-

quired by holding that the question of permanence of disability is one that can be established only by expert evidence is a decision of an important question of general law probably untenable and in conflict with the weight of authority.

3. The decision of the Circuit Court of Appeals as to the test of permanent and total disability by holding that the question of permanence can be established only by expert evidence involves an important question of Federal law which has not been but should be settled by this Court.

WHEREFORE your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court the full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 183, United States of America, defendant-appellant vs. Newton W. Lumbra, plaintiff-appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States and that the judgment herein of said Circuit Court be reversed by the Court and for such further relief as to this Court may seem proper.

Dated, May twenty-fifth, 1933.

NEWTON W. LUMBRA,
by
J. A. MCNAMARA,
HAROLD C. SYLVESTER,
CONSUELO B. NORTHROP,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

NEWTON W. LUMBRA,
Petitioner and Appellee below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellant below.

No. 183.

Brief in Support of Petition for Writ of Certiorari.

I.

Opinion of the Courts Below.

The opinion in the Circuit Court of Appeals for the Second Circuit is reported in 63 Fed. (2) 796, as follows:

AUGUSTUS N. HAND, *Circuit Judge:*

This is an appeal by the government from a judgment in favor of Newton W. Lumbra, who brought action to recover upon a War Risk Insurance policy. We think the judgment must be reversed, because there was no evidence that on May 1, 1919, when the policy lapsed for non-payment of premiums, it was reason-

ably certain that the disability of the insured would continue throughout his life.

From 1917 to 1919 Lumbra was a soldier in the military service of the United States. He testified that he was injured in France during a bombardment by the explosion of a shell, which fell near him while he was on his way back from the trenches to his dugout. He suffered a physical injury to his ankle and was thrown down and rendered unconscious by the concussion. The explosion occurred on June 17, 1918. He was taken into his dugout where he regained consciousness, and afterwards to the hospital, from which he was discharged late in August. Before the explosion he had been in good health. While confined in the hospital he said that he had "faint, weak spells, dizzy spells,—everything go black, and the sweat stand out on me and I would have to sit down." As soon as he had recovered from the injury to his ankle he went back to his company and was given light work in the kitchen, but the "spells" continued and got gradually worse. After his return to the United States from France and his discharge from military service, (which was on April 29, 1919), he went to his mother's house in Vermont, and did nothing for three or four months. He then began to work for the Wilcox Hall Company, rolling logs in their vats. This work was found to be too hard for him, and he was put at something lighter. He lost about half his time because of the dizzy spells, which got worse, and finally in 1921 he was forced to give up this employment. He then went to St. Albans and stayed for some time at a sister's, after which he obtained employment as a machinist's helper with the Vermont Central Railroad. He first worked for the

railroad in the capacity, and later as a laborer. This employment with the railroad lasted from June, 1922, for about a year, but he lost considerable time owing to his ailment. In June, 1923, he went to work for the Boston & Maine Railroad, and worked until November, losing considerable time with it because of his condition. He then returned to the Vermont Central and remained with it until February, 1929, but was put at light work, and finally was only able to sweep around the railroad shop and attend to the lavatories. His attacks increased in frequency; and in 1923 they manifested themselves in epileptic seizures, which became so frequent and severe that in 1929 he had to cease all employment. From 1926 Lumbra was in the hospital seven different times from two weeks to two months. There was testimony that the railroad employed him as long as it did because he was an overseas veteran and veterans were specially favored.

Dr. Skeels testified as a expert on behalf of the plaintiff. He said that in his opinion he had "epileptiform convulsions * * * and they were caused by an injury he had from the high explosive * * *." But there was no testimony that when he allowed his policy to lapse his condition was such that it could be said with reasonable certainty that he then had epilepsy or that epilepsy would ensue or that for any reason he was then permanently disabled. There was evidence from which a jury might find that when the plaintiff ceased to pay premiums in May, 1919, he was totally disabled, but none from which they might find that his disability was permanent.

There was evidence on behalf of the defendant that the plaintiff was not subject to epileptic seizures, but

that his condition was one of "mixed neurasthenia and hysteria." The defendant also introduced various applications by Lumbra for employment with the Central Vermont Railroad in which he stated that he had no physical defect. The plaintiff's own evidence, however, was substantially as we have stated.

There is no liability for permanent total disability occurring after the lapse of a War Risk Insurance policy, even though caused by injuries suffered during military service and while the policy is in force. Eggen v. United States, 58 Fed. (2nd) 616; United States v. McLaughlin, 53 Fed. (2nd) 400, (C. C. A. 8). Liability must be founded upon total permanent disability while the policy is in force.

Total disability is any impairment of mind or body which renders it impossible for the insured to engage continuously in any substantially gainful occupation, and total disability is permanent if it is founded upon conditions which make it reasonably certain that it will continue throughout life. In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation. He testified that he was then subject to spells of dizziness and faintness which prevented continuous work, but there is nothing to show that at that time conditions were such that it could be said with reasonable certainty that he was not likely to recover. Dr. Skeel's testimony that in his opinion the epileptiform convulsions were caused by an injury from the high explosive was no proof that in May, 1919, it was reasonably certain that permanent disability would result from his then condition. Dr. Skeels never said in

words or substance that a man having a subsequent bodily history like that of Lumbra was in a condition in May, 1919, that made permanent disability reasonably certain. Nor did anyone testify that in May, 1919, the "spells," if arising from the explosion of the shell near the plaintiff, would be permanent or would result in epileptic convulsions proximately or ultimately. It is not enough to show that four years after the "spells" began epilepsy supervened. In May, 1919, the plaintiff himself was not aware of any permanent disability, nor apparently was his physician, Dr. Titus, who treated him in December, 1920, for "rheumatism, chronic bronchitis and nervousness." It is not shown that his condition was incurable in May, 1919, merely because it became so years later. For aught we know, various things other than the shock of the explosion may have contributed to the epileptic convulsions, even though the convulsions would not have occurred without it. For a layman or a petit jury to say that Lumbra's supposed brain lesion or other injury caused by the explosion, though sufficient to produce attacks of dizziness and headaches, involved a condition which rendered it reasonably certain that disability would continue during lifetime is indulging in mere guesswork. They and we manifestly know nothing about it, and the plaintiff's case was not established by proof that epilepsy finally ensued. The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919, were reasonably certain to produce permanent disability. No such evidence was produced and the plaintiff failed to establish his claim because it was lacking. Eggen v. United States, 58 Fed. (2nd) 616, (C. C. A.

8); United States v. McLaughlin, 53 Fed. (2nd) 450, (C. C. A. 8); Clair v. United States, 47 Fed. (2nd) 109, (C. C. A. 8). This result is in accordance with the rule laid down in Clapp v. United States, the opinion in which is filed herewith.

The judgment is accordingly reversed.

L. HAND and SWAN, Concur.

Since the rule referred to above was laid down in Clapp v. United States, the opinion in which was filed with the opinion in the instant case, so much of said opinion as states the rule is here added.

"L. HAND, *Circuit Judge:*

* * * The proper test, we think, is this. The insured can recover only by showing that at the lapse he was suffering from some ailment, of which it is possible to say with reasonable certainty that it was incurable at that time, or with equal certainty that it must lead to another and incurable ailment. The fact alone that it did culminate in such another does not make a case. This is apparently the doctrine in the Eighth Circuit. McLaughlin v. U. S., 53 Fed. (2) 450; Eggen v. U. S., 58 Fed. (2) 616; Proechal v. U. S., 59 Fed. (2) 648. The discussion of Judge Sanborn in Eggen v. U. S. is particularly enlightening. *Cf.* Nicolay v. U. S., 51 Fed. (2) 170, 173, (C. C. A. 10). There are indeed decisions where permanance seems to have been assumed merely from the fact that at the trial the disability had become so, but, so far as we can find, the point was not discussed. Ford v. U. S., 44 Fed. (2) 754, (C. C. A. 1); Auer v. U. S., 51 Fed. (2) 921, (C. C. A. 3); Madray v. U. S., 55 Fed. (2) 552, (C. C.

A. 4); U. S. v. Phillips, 44 Fed. (2) 689, (C. C. A. 8); Fladeland v. U. S., 53 Fed. (2) 17, (C. C. A. 9); Golden v. U. S., 34 Fed. (2) 367, (C. C. A. 10). So far as these decisions may be thought to countenance an opposite view, we think that the doctrine of the Eighth Circuit is the better. Tyrakowski v. U. S., 50 Fed. (2) 766, (C. C. A. 7) seems to have been consciously to the contrary, but we cannot accept it. We hold that the only use to be made of information which becomes available between the lapse and the trial, is to discover what was the actual pathological condition of the insured at the lapse; the prognosis, once that is discovered, is to be made as of the lapse and without regard to what in fact followed.

In the case at bar, no doctor declared that at the end of May, 1919, the plaintiff was suffering from duodenal ulcer. Only on the hypothesis that he was, did the plaintiff argue that his indigestion was reasonably certain permanently to disable him. No doctor was found hardy enough to say that indigestion, unaccompanied by ulcer, was reasonably certain so to continue for life. Should one appear, we must await his testimony before passing upon it. The existence of a duodenal ulcer in May, 1919, was not for a jury to determine upon its own uninformed intuitions. It was a strictly medical question; without the help of those skilled in the science, the conclusions of laymen upon such an issue were without adequate basis, and necessarily mere speculation. Only those familiar with the origin and course of the malady were competent to testify, and without testimony a verdict stood unsupported."

AUGUSTUS N. HAND, SWAN. Concur.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is March 6, 1933.

2. The rulings of the Circuit Court of Appeals were such as to bring this case within Rule 38, Sect. 5b.

(a). The decision raises a conflict with decisions of other Circuit Courts of Appeal.

The opinion in this case states "This result is in accordance with the rule laid down in Clapp vs. U. S. the opinion in which is filed herewith". The opinion in Clapp vs. U. S. relative to the rule in question is as follows: "There are indeed decisions where permanence seems to have been assumed merely from the fact that at the trial the disability had become so, but, so far as we can find, the point was not discussed (cases cited). So far as these decisions may be thought to countenance an opposite view, we think that the doctrine of the Eighth Circuit is the better. Tyrakowski v. U. S., 50 Fed. (2) 766, (C. C. A. 7) seems to have been consciously to the contrary, but we cannot accept it". The Circuit Court of Appeals for the Second Circuit has therefore decided an important and material question in conflict with a decision of another Circuit.

(b) The decision has decided an important question of law probably in conflict with the weight of au-

thority and probably in conflict with applicable decisions of this Court.

(c) The decision in question has decided an important question of Federal Law which has not been but should be settled by this Court.

3. Cases believed to sustain the jurisdiction of this Court are as follows:

Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 43 Sup. C. 422, 67 L. Ed. 712.

Western Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463, 44 Sup. C. 342, 68 L. Ed. 792.

U. S. v. Arzner, No. 191
U. S. Sup. Ct. Oct. Term, 1932

III.

Statement of Case.

This has already been stated in the preceding petition under I (pp. 1-3), which is hereby adopted and made part of this Brief.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the permanence of a total disability at date of lapsation of policy for non-payment of premium was a fact requiring expert evidence.

2. The Circuit Court of Appeals erred in holding that because no expert evidence was produced of the permanence of petitioner's total disability at date of lapsation of policy for non-payment of premium, the petitioner failed to establish his claim.

V.

Argument.

1. THE DECISION OF THE COURT BELOW IN HOLDING THAT THE PERMANENCE OF A TOTAL DISABILITY AT DATE OF LAPSATION OF POLICY FOR NON-PAYMENT OF PREMIUM WAS A FACT REQUIRING EXPERT EVIDENCE IS IN DIRECT CONFLICT WITH THE RULE OF LAW OF THIS COURT APPLICABLE TO SUCH CASES AND WITH THE WELL SETTLED AND UNIVERSALLY RECOGNIZED RULE OF LAW AS ANNOUNCED IN THE DECISION OF THIS AND OTHER COURTS.

PERTINENT STATUTES AND REGULATIONS.

Section 13 of the War Risk Insurance Act (40 Stat. 555) is in part:

> That the director subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in Section five.

Section 5 of the World War Veterans' Act (43 Stat. 609 U. S. C. 426), is in part:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein.

(T. D. 20, W. R.)

TOTAL DISABILITY.

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

Treasury Department

Bureau of War Risk Insurance

Washington, D. C., March 9, 1918

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act, the following regulation is issued relative to the definition of the term "total disability", and the determination as to when disability shall be deemed permanent: Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent", whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering

from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DEL'ANNO,
Director.

Approved:
W. G. McADOO
Secretary of the Treasury.

Total disability therefore shall be deemed permanent whenever it is found upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. The Circuit Court of Appeals has construed "reasonably certain that it will continue throughout the life of the person suffering from it" as requiring expert evidence. This is identical with the type of cases requiring "an eye witness to death or personal injury, 'a direct and positive proof of accident causing death or injury'", and similar expressions frequently embodied in life and accident and health policies.

This Court has definitely established the rule in such matters and this rule has been adopted so that it is a well settled rule of law and weight of authority. No particular type of evidence is required but all material and relevant evidence, whether direct or circumstantial, must be submitted.

"The requirement, however of direct and positive proof, as to certain matters, did not make it neces-

sary to establish the fact and attendant circumstances of death by persons who were actually present when the insured received the injuries which caused his death * * *. The evidence on that point was direct and positive, as much so, within the meaning of the policy as if it had come from one who saw the pistol fired and the proof on this point is none less direct or positive because supplemented or strengthened by evidence of a circumstantial character."

Travellers Insurance Co. of Hartford, Conn. vs. Nadie P. McConkey, 127 U. S. 661.

New Orleans, etc. vs. National Rice Mills Co., 234 U. S. 80, 30 Sup. C. 726, 58 L. Ed. 1223.

Preferred Accident Insurance Co. vs. Barker, 93 Fed. 158 (C. C. A. 5).

Jenkins v. Pacific M. L. Insurance Co., 131 Calif. 121, 63 Pac. 180.

National Accident Society vs. Bolstin, 101 Ill. Appeals 192.

Travellers Insurance Co. vs. Shepard, 85 Ga. 751, 12 S. E. 18.

Utter vs. Travellers Insurance Co., 65 Mich. 545.

Rawlins vs. Business M. A. Association, 204 Mo. Appeal 679, 220 S. W. 1022.

Reynold vs. Equitable Accident Co., 48 Hun. N. Y. 605, 1 N. Y. 738.

N. Y. Life Insurance vs. Brown, 39 Fed. (2) 376 (C. C. A. 5).

A definitely established rule on contracts requiring a particular type of proof is that any such requirement does not preclude the use of circumstantial evidence or even the reliance wholly upon such evidence,

since to exclude these forms of evidence would be to permit the policy to control and abrogate the established rule of law that a contract may be supported by circumstantial evidence in violation of the further rule that such a conflict must be reconciled by adherence to the law and repudiation of the contract provision.

7 Couch on Insurance, 5495.

The reason given for holding this as an established rule of law in this class of cases is that the Courts are not disposed to favor stipulations or agreements, in effect, tending to overthrow the established rules of evidence.

2 Couch on Insurance, 1512.

The rule of the Circuit Court requiring expert testimony bases the proof of one of the two essential questions in cases of this type upon expert opinion rather than upon all the evidence. The Courts have generally refused to adopt such a rule and it is contrary to the universally established rule in such manner.

Jones Commentary on Evidence 1913.

2. THE DECISION OF THE COURT BELOW REQUIRING EXPERT EVIDENCE OR ANY PARTICULAR TYPE OF EVIDENCE IS IN DIRECT CONFLICT WITH THE ESTABLISHED RULE OF THIS COURT AND WITH THE WELL SETTLED AND UNIVERSALLY RECOGNIZED RULE OF LAW AS ANNOUNCED IN THE DECISION OF THIS AND OTHER COURTS.

The question of disability or permanence of disability of any other element of petitioner's case is to

be established by a preponderance of all relevant evidence.

Knickerbocker Life Insurance Co. vs. Trefs, 104 U. S. 197, 26 L. Ed. 708.

Preferred Accident Insurance Co. vs. Barker, 93 Fed. 158.

Black vs. Travellers Insurance Co., 121 Fed. 732.

7 Couch on Insurance, 5495.

2 Couch on Insurance, 1512:

"It is for the jury to determine whether insured has suffered a total or partial disability and whether disability is permanent."

1 Corpus Juris, 511.

U. S. Casualty Co. vs. Hanson, 20 Colo. A. 393, 79 Pac. 176.

Tyrakowski vs. U. S. 50 Fed. (2) 766 (C. C. A. 7).

Bartee vs. U. S., 60 Fed. (2) 247 (C. C. A. 6).

U. S. vs. Fitzpatrick, 62 Fed. (2) 562 (C. C. A. 10).

Conclusion.

It is respectfully urged that the question for determination was whether or not petitioner's total disability was a permanent one at date policy lapsed, to be decided upon all the evidence relevant thereto and was not dependent upon expert evidence tending to establish this fact.

It conclusively appears that the decision of the Court below is in direct conflict with decisions of this Court and with the well settled and universally recog-

nized rule of law applicable to said matters. The questions involved are important questions of federal, local and general law and involve the interpretation of a United States Statute.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

J. A. McNamara,
Harold C. Sylvester,
Consuelo B. Northrop,
Counsel for Petitioner.